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In the Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR., PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause prohibits a State from assigning to the defendant in a criminal case the burden of proving that he is incompetent to stand trial.

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INTEREST OF THE UNITED STATES

Section 1369(f) of the California Penal Code establishes a presumption that the defendant in a criminal case is competent to stand trial and assigns to the defendant the burden of proving that he is incompetent. The question in this case is whether Section 1369(f) violates the Due Process Clause of the Fourteenth Amendment. This Court's resolution of that question will directly bear on the constitutionality of 18 U.S.C. 4241(d), a provision of the Insanity Defense Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2057-2059; App. A, *infra*, 1a-2a. Section 4241(d) of Title 18 authorizes a court to make a finding of incompetence only if the court is persuaded, by a preponderance of the evidence, that,

because of a mental disease or defect, the defendant "is unable to understand the nature and consequences of the proceeding against him or to assist properly in his defense." That statute in effect places the burden of proving that the defendant is incompetent to stand trial on the party asserting incompetence. The United States therefore has a direct interest in the outcome of this case.

STATEMENT

1. Petitioner engaged in a crime spree from October 13 to November 7, 1984. During that period, petitioner stole a gun from a pawnshop and then robbed two gas stations, a drive-in dairy, and a market. In the course of the robberies, petitioner murdered three employees of those establishments, attempted to rob a fourth, and shot at two persons who tried to follow his getaway car. J.A. 90.

2. Before trial, petitioner moved for a hearing on his competence to stand trial. The court granted the motion and held an evidentiary hearing before a jury, at which various expert and lay witnesses gave conflicting testimony about petitioner's competence. J.A. 3-84, 90-91. At the close of the hearing, the trial judge instructed the jury, in accordance with Cal. Penal Code § 1369(f) (West 1982), that petitioner was presumed to be competent to stand trial and that he had the burden of proving his incompetence. J.A. 87. The jury found him competent. J.A. 88.

Thereafter, petitioner was tried on various charges arising from his crime spree. He was convicted on three counts of murder as well as several other offenses; the jury found that each murder was deliberate and premeditated, and that petitioner was sane at the time of the charged offenses. He was sentenced to death for the three murders. J.A. 89-92.

3. The Supreme Court of California affirmed petitioner's convictions and sentence by a divided vote. J.A. 89-146. The court rejected his claim that Cal. Penal Code § 1369(f) violated his rights under the Due Process Clause by requiring him to bear the burden of proving his incompetence to stand trial. J.A. 93-101. The court held that a state legislature has considerable freedom in assigning the burden of proof on the issues in a criminal case, as long as the prosecution bears the burden of proving every element of the charged offense. J.A. 97-99. The court then determined that it was rational for the legislature to assign the burden of proof on the issue of competence to the defendant, because the defendant and his attorney would have better access than the State to the facts relevant to that inquiry. J.A. 99-100. Addressing the meaning of the presumption of competence set forth in Section 1369(f), the court held that the presumption is simply another way of expressing the legislative intent to place the burden of proof on the party seeking to establish that the defendant is incompetent.[1]

SUMMARY OF ARGUMENT

A. It does not violate any long-settled and widely accepted legal principle to place the burden of proof on the issue of competence on the party seeking to show that the defendant is mentally unfit to be tried. The common law did not impose the burden on the party seeking to prove competence, and very few modern legislatures have adopted such a rule. Thus, the objective evidence bearing on the due process in-

[1] Justices Mosk and Broussard dissented. They concluded that due process forbids assigning to a criminal defendant the risk of nonpersuasion on this issue. J.A. 146-163.

quiry provides no support for petitioner's challenge to the constitutionality of Cal. Penal Code § 1369(f).

B. The allocation of the burden of proof in Section 1369(f) is also reasonable. Due process requires the State to prove the elements of any charged offense beyond a reasonable doubt. Section 1369(f) does not lighten that burden, because a defendant's competence to stand trial is not an element of a criminal offense. Nor is Section 1369(f) unconstitutional because it imposes the burden of establishing incompetence on a party who, because of his incompetence, may be unable to satisfy that burden. The procedures required by the Constitution and erected by the State for litigating the issue of competence ensure that the issue will be fully and fairly aired even if the defendant himself is unable to cooperate in the litigation of the issue.

We believe that the absence of any indication that the California rule is inconsistent with traditional Anglo-American practices or principles of fairness should settle the due process issue. But even if the constitutional question may be resolved only by balancing the competing interests, there is no compelling case for imposing the burden of proof on the party claiming the defendant to be competent. To be sure, a defendant has an important interest in not being tried if he is incompetent, and placing the burden on the defendant to establish his incompetence will doubtless result in some erroneous findings of competence. But placing the burden on the government is equally likely to produce erroneous findings of incompetence. And those errors will have significant adverse effects as well. A finding of incompetence delays and may even preclude the resolution of criminal charges against the defendant, which imposes burdens

on witnesses, victims, and victims' families. Moreover, a finding of incompetence typically results in restraints on liberty such as confinement in a mental facility and psychiatric treatment, which may include treatment against the defendant's will. By reducing the risk of finding a competent defendant incompetent, Section 1369(f) reduces the likelihood that the defendant will erroneously be subjected to those restraints.

ARGUMENT

DUE PROCESS DOES NOT PROHIBIT A STATE FROM ASSIGNING THE BURDEN OF PROOF ON THE ISSUE OF COMPETENCE TO THE PARTY ASSERTING THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL

The Due Process Clause prohibits the trial of a mentally incompetent defendant. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Pate* v. *Robinson*, 383 U.S. 375 (1966). The issue of competence, when raised by the evidence, is typically resolved at a pretrial hearing. This case involves the question of which party bears the burden of proof at a hearing on the competency issue. Section 1369(f) of the California Penal Code adopts a rebuttable presumption that the defendant is competent to stand trial and assigns the burden of proof to the party asserting incompetence. The California Supreme Court held that allocating the burden in that way does not violate the Due Process Clause of the Fourteenth Amendment. In our view, history and reason support that judgment.

A. Anglo-American Legal History And Contemporary Legislation Do Not Require The State To Prove That A Defendant Is Competent To Stand Trial

The teaching of Anglo-American legal history and the judgments of contemporary legislatures bear heavily on the meaning of the Due Process Clause.

See, *e.g.*, *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991), slip op. 3-5; *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). Historical analysis has often been applied to constitutional challenges to the allocation of the burden of proof in criminal cases. See *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (requiring defendant to bear the burden of proof on affirmative defenses "was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified"); *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987); *In re Winship*, 397 U.S. 358, 361-362 (1970); *Leland* v. *Oregon*, 343 U.S. 790, 796-799 (1952). As this Court explained in *Patterson* v. *New York*, 432 U.S. at 201-202:

> Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

The historical record and contemporary evidence convincingly prove that allocating to the defendant the burden of proving that he is incompetent to stand trial does not violate any deeply rooted Anglo-American legal tradition.

1. *The State historically has not been required to prove that the defendant is competent to stand trial*

a. *The English tradition.* Perhaps the first recorded judicial treatment of the propriety of trying a person who was "insane" (the term then used to refer to incompetence by reason of mental disorder) occurred in 1353. In that year, Justice Hill, one of Edward III's itinerant justices, decided not to try an "enraged" quadruple murderer until the defendant had "recovered his senses." N. Walker, *Crime and Insanity in England* 220 (1968). Blackstone stated the common law rule when he wrote that "if, after he has pleaded, the prisoner becomes made, he shall not be tried: for how can he make his defence?" 4 W. Blackstone, *Commentaries* *24. By the time of the American Revolution, the rule barring the trial of the insane was firmly entrenched.[2]

At the same time, virtually no attention was paid to the question of which party bore the burden of proof on the issue of competence. The early decisions are silent on the subject,[3] and the only commentator to express a view on the matter was Sir Matthew Hale, who appears to have assigned the burden of proof to the party claiming that the defendant could not be tried because of his incompetence.[4] Even peti-

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[2] *E.g.*, 3 E. Coke, *Third Institute* 6 (6th ed. 1680); 1 M. Hale, *Pleas of the Crown* 34 (*34-*35) (1st Am. ed. Philadelphia 1847); 1 W. Hawkins, *Pleas of the Crown*, ch. I, §§ 3-4, at 2-3 (6th ed. London 1777). Post-revolutionary commentators endorsed that rule, too. See 1 J. Archbold, *A Complete Practical Treatise on Criminal Procedure* 26-31 (7th ed. New York 1860); 1 J. Chitty, *A Practical Treatise on the Criminal Law* 760 (*761) (5th Am. ed. New York 1847); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 20-21 (1st Am. ed. Boston 1824).

[3] See, *e.g.*, *Hadfield's Case* (1800), 27 Stat. Trials 1281 (Howell ed. 1820); *Firth's Case* (1790), 22 State Trials 307 (Howell ed. 1817); *Kinlock's Case* (1746), 18 State Trials 395 (Howell ed. 1816), 411; *R.* v. *Arnold* (1724), 16 State Trials 695 (Howell ed. 1816).

[4] Before stating that a person "of non sane memory" cannot be tried, he wrote that "[i]n presumption of law, every

tioner, who contends that the common law supports his position, ultimately concedes that the common law was "not entirely clear" in 1787. Br. 36. It is more accurate to say that there was no common law rule on this issue at all.

It was not until the mid-19th century that courts began to consider the burden of proof issue. Even then, the few cases that discussed the matter could not agree on its proper allocation. See *Regina* v. *Podola*, 43 Crim. App. 220, 235-236, [1959] 3 All E.R. 418, 429-430 (citing conflicting cases); N. Walker, *supra*, at 231 (the burden of proof "swung to and fro over the last century").[5] The English

person of the age of discretion is presumed of sane memory, unless the contrary be proved." 1 M. Hale, *supra*, at 33 (*33).

[5] Petitioner's contrary assertion—that placing the burden on the prosecution to prove the defendant's competence was the unquestioned English practice from 1787 until the mid-19th century, Br. 37—is incorrect. The case he relies on, *King* v. *Steel*, 1 Leach 452, 168 Eng. Rep. 328 (1787), placed the burden on the prosecution only because a jury had already found the defendant "Mute by visitation of God," *i.e.*, deaf and dumb. 1 Leach at 452, 168 Eng. Rep. at 328. The decision therefore stands only for the proposition that when a defendant is found to be deaf and dumb, he is presumed to be incompetent to stand trial.

Our research discloses confusion throughout the 19th century over the burden of proof on the issue of competence. Compare R. v. *Dyson*, 7 Carrington & Payne 305, 307 (note), 173 Eng. Rep. 135, 136 (note) (1831) (placing burden of proof on defendant by instructing jurors to acquit if "they were satisfied that the prisoner had not then, for the defect of her faculties, intelligence enough to understand the nature of the proceedings against her") (emphasis omitted) with *R.* v. *Davies*, 6 Cox 326, 175 Eng. Rep. 575 (1853) (prosecution bears the burden). See also *Ley's Case*, 1 Lewin 239, 240, 168 Eng. Rep. 1026, 1026 (1828) ("If there be a doubt

courts did not finally resolve the matter until 1959 when they rejected the rule proposed by petitioner. In *Refina* v. *Podola*, *supra*, the Court of Criminal Appeal held that the burden of proof falls on the party asserting that the defendant is incompetent, and that is the present English rule. G. Williams, *Criminal Law* § 143, at 437 n.12 (2d ed. 1961).[6]

b. *The American tradition.* Early in our history, American courts adopted the English rule that an insane defendant could not be arraigned or tried. See, *e.g.*, *Commonwealth* v. *Braley*, 1 Mass. 102 (1804). This Court endorsed the rule in 1956, *Bishop* v. *United States*, 350 U.S. 961, and a decade later the Court imposed it on the States under the Due Process Clause of the Fourteenth Amendment, *Pate* v. *Robinson*, 383 U.S. 375 (1966).

As in England, American courts historically paid little attention to the question of who bears the burden of proof on the issue of competence. Some early cases stated that a defendant is presumed to be sane,[7] but

as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial.").

[6] Petitioner criticizes *Podola* on the ground that the trial court allegedly confused insanity with incompetence. Br. 38, citing [1959] 3 All E.R. at 419. But it was the Court of Criminal Appeal that ultimately decided the case, 43 Crim. App. at 220, [1959] 3 All E.R. at 426-433, and that court exhibited no such confusion. It clearly understood that the question was whether the defendant was competent to stand trial, and it just as clearly placed the burden of proof on the party asserting that the defendant was incompetent.

[7] See, *e.g.*, *Youtsey* v. *United States*, 97 F. 937, 941 (6th Cir. 1899); *United States* v. *Chisolm*, 149 F. 284, 289 (S.D. Ala. 1906); *State* v. *Arnold*, 12 Iowa 479, 484 (1861).

did not further discuss how the burden of proof on competence was to be allocated between the State and the defense.[8] Only in the past two decades have the courts focused on the burden of proof issue, and those decisions are not especially instructive. Virtually every recent decision addresses the issue as a matter of constitutional law, not policy, and thus answers the question whether the State *must* prove that a defendant is competent to stand trial, not whether the State *should* be required to prove that fact. In any event, contemporary case law is closely divided as to where the burden of proof should rest. J. Monahan & H. Steadman, *Mentally Disordered Offenders* 14 (1983).[9] Thus, our legal history does not reflect a consensus on how the burden of proof should be allocated, and it certainly does not dictate that the State must bear that burden, as petitioner claims.

2. Contemporary legislation does not establish a consensus requiring a State to prove that a defendant is competent

Contemporary legislation also does not support petitioner's position. Federal law places the burden of proof on the party asserting that the defendant is

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[8] One decision early in this century said that the defendant had to prove that he was incompetent, *State* v. *Helm*, 69 Ark. 167, 61 S.W. 915 (1901); another said that the accused has the burden of raising a reasonable doubt as to his competence, *United States* v. *Chisolm*, 149 F. at 290; and a third said that the defendant had the burden of proving that he was insane, but (inconsistently) went on to say that the jury should find a defendant incompetent if it had a reasonable doubt on the issue, *United States* v. *Lancaster*, 7 Bissell's Rpts. 440, 444 (C.C.N.D. Ill. 1877).

[9] The recent state and federal cases are cited in an appendix to this brief.

incompetent to stand trial.[10] Although every State has enacted legislation dealing with the issue of competence to stand trial, only 14 of the state statutes address the allocation of the burden of proof. Two of them require the prosecution to prove that the defendant is competent to stand trial.[11] One requires the prosecution to prove the contrary of whatever

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[10] 18 U.S.C. 4241(d). Section 4241(d) was adopted as part of the Insanity Defense Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2057-2059. Before 1984 federal statutes dealing with incompetence did not allocate the burden of proof on this matter. See 18 U.S.C. 4244 (1982); Rev. Stat. § 4851 (1874).

The Fifth and Ninth Circuits have said that 18 U.S.C. 4241(d) requires the government to prove that a defendant is competent. *Lowenfield* v. *Phelps*, 817 F.2d 285, 294 (5th Cir. 1987), aff'd on other grounds, 484 U.S. 231 (1988); *United States* v. *Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987); *United States* v. *Frank*, 933 F.2d 1491 (9th Cir. 1991); *United States* v. *Hoskie*, No. 89-10348 (9th Cir. Dec. 6, 1991), slip op. 15,437-15,438. Those courts, however, have simply misread the 1984 statute. *Lowenfield* involved a state prisoner's challenge to a Louisiana law assigning to the accused the burden of proving incompetence. The court's statement about the federal statute is therefore dictum. *Lowenfield* also did not discuss the changes in federal law wrought by the 1984 Act; the court just cited case law construing the pre-1984 federal statute. *Hutson* just relied on *Lowenfield* and a pre-1984 case without independently analyzing the issue; *Frank* relied on *Hutson;* and *Hoskie* relied on *Frank*. Thus, the later cases have simply reiterated the Fifth Circuit's initial error in *Lowenfield*. None of those cases is persuasive authority for placing the burden of proof on the government.

[11] Ill. Ann. Stat. ch. 38, para. 104-11 (Smith-Hurd 1980); Minn. R. Crim. P. 20.01, subd. 3(6) (West 1991).

the defendant alleges.[12] The remainder place the burden of proving incompetence on the party raising that claim.[13] S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 703, Table 12.1, col. 18, at 744-754 (3d ed. 1985) [hereinafter cited as *Mentally Disabled*]. The pattern of contemporary statutes therefore does not establish a national consensus against requiring a defendant to prove his incompetence. See *Stanford* v. *Kentucky*, 492 U.S. 361, 370-373 (1989) (no consensus exists barring the execution of 16-year-olds when a majority of the States with capital punishment laws allow such persons to be executed). If anything, the pattern among those jurisdictions that have legislation addressing the matter suggests a consensus in favor of the California

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[12] Wis. Stat. Ann. § 971.14(4)(b) (West Supp. 1991). The Wisconsin statute provides that if a defendant claims to be incompetent, he must be found to be incompetent unless the State proves by a preponderance of the evidence that he is competent. By contrast, if a defendant claims to be competent, Wisconsin law directs that the defendant will be found competent unless the State proves by clear and convincing evidence that he is incompetent.

[13] Alaska Stat. § 12.47.110 (1990); Colo. Rev. Stat. § 16-8-111(2) (1986); Conn. Gen. Stat. Ann. § 54-56d(b) (West 1985); Mass. Ann. Laws ch. 123, § 15(*d*) (Law. Co-op. 1989); Ohio Rev. Code Ann. § 2945.37(A) (1987 & Supp. 1990); Okla. Stat. Ann. tit. 22, § 1175.4(B) (1986 & Supp. 1991); Pa. Stat. Ann. tit. 50, § 7403(a) (Purdon Supp. 1991); Tex. Crim. Proc. Code Ann. art. 46.02, § 1(b) (Vernon 1979); Va. Code Ann. § 19.2-169.1(E) (1990); Wash. Rev. Code Ann. § 10.77.090(2) (1990); W. Va. Code § 27-6A-1(d) (1986). The Michigan statute states that the defendant is presumed to be competent, but it does not expressly address the burden of proof issue. Mich. Comp. Laws Ann. § 330.2020 (West 1980); see *People* v. *Ritsema*, 105 Mich. App. 602, 606, 307 N.W.2d 380, 382 (1981).

rule, which places the burden on the party seeking to establish incompetence.

B. Assigning The Burden Of Proof To The Party Claiming That The Defendant Is Incompetent To Stand Trial Reasonably Balances The Competing Interests

1. *Section 1369(f) does not lighten the State's burden of proving every element of a charged offense*

Due process requires a State to bear the burden of proof, beyond a reasonable doubt, on every element of a charged offense. *In re Winship*, *supra*. Otherwise, a State has considerable latitude in allocating the burden of proof. For example, a State may require a defendant to bear the burden of proving the affirmative defense of insanity, *Leland* v. *Oregon*, 343 U.S. 790 (1952), or that he acted in self-defense, *Martin* v. *Ohio*, 480 U.S. 228 (1987), or in the heat of passion, *Patterson* v. *New York*, 432 U.S. 197 (1977). See also *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 172-176 (1872) (defendant can be made to bear the burden of proof or production on an exception to a statutory offense). Similarly, the State may require a defendant convicted of a capital crime to bear the burden of establishing mitigating circumstances sufficient to call for a penalty less than death. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3055-3056 (1990).

The rationale of those decisions is applicable to this case, since competence to stand trial is not an element of a criminal offense. As this Court has explained, a defendant's "criminal responsibility at the time of the alleged offenses * * * is a distinct issue from his competency to stand trial." *Jackson* v. *Indiana*, 406 U.S. 715, 739 (1972). The two questions involve different elements and different time periods.

See *Lynch* v. *Overholser*, 369 U.S. 705, 709 n.4 (1962). The mens rea element of a crime is retrospective; the prosecution must prove that the defendant committed "an unlawful act" with "a vicious will." *Davis* v. *United States*, 160 U.S. 469, 484 (1895). By contrast, the standard for competence to stand trial focuses on the present; the inquiry is whether a person has the "present ability" rationally to understand the nature of the proceedings and assist his lawyer in his defense. *Dusky* v. *United States*, 362 U.S. 402, 402 (1960). Requiring a defendant to prove his incompetence therefore does not lessen a State's burden under *Winship*.

2. The defendant's asserted inability to assist in the determination of his competence does not require the State to bear the burden of proof on that issue

This Court said in *Pate* v. *Robinson*, 383 U.S. at 384, that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Some courts have relied on that passage to hold that the State must prove that the defendant is competent to stand trial. See, *e.g.*, *United States* v. *DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *People* v. *McCullum*, 66 Ill. 2d 306, 312-314, 362 N.E.2d 307, 310-311 (1977). Those courts, we submit, have misread *Pate*.

Pate did not address the burden of proof. It addressed the State's argument that "Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law." 383 U.S. at 384. This Court rejected that argument because of the obvious contradiction on which the State's claim hinged. But the question whether the defendant has forfeited his right to contend on appeal that he was incompetent when he was tried is not the same as the question whether a defendant can be assigned the burden of proving that he is not mentally fit to be tried once that issue is before the trial court. The waiver issue involves the problem of how the defendant's competence can be brought before a trial court for resolution when the defendant himself may be unable, due to his mental illness, to raise that issue; the answer to that problem is to require the trial judge to make an inquiry into the defendant's competence if there is a bona fide doubt about the defendant's fitness to be tried. See *Drope*, 420 U.S. at 172-182; *Pate*, 383 U.S. at 385-386. The burden-of-proof issue is concerned with a different problem: how to allocate the risk of nonpersuasion between the State and the defendant, once the issue has been raised. *Pate* did not purport to address, let alone resolve, that issue.

Given the safeguards required by the Constitution and routinely made a part of the procedure for competency determinations, a defendant's mental illness will not hamper the correct resolution of the competency issue regardless of the allocation of the burden of proof. The trial judge has the duty to inquire into the defendant's competence if there is reason to doubt that the defendant can understand the proceedings or assist his attorney. *Drope*, 420 U.S. at 172-182; *Pate*, 383 U.S. at 385-386; see Cal. Penal Code § 1368(a) (West 1982). Once a defendant's competence has been called into question as a result of observations by defense counsel, the prosecutor, or the court itself, the court can order him psychiatrically examined and can temporarily commit him

to a mental hospital for that purpose. Cal. Penal Code §§ 1369(a), 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(b), 4247(b). Mental health experts can examine the defendant and testify about their findings at any ensuing competence hearing. Cal. Penal Code §§ 1369(b)-(d) and 1370(b)(1) (West 1982 & Supp. 1991); 18 U.S.C. 4241(b) and (c), 4247(b), (c), and (e). Even if the court finds that the defendant is competent to stand trial, it has a continuing obligation to monitor the defendant's competence throughout the trial and must reconsider the matter if new facts raise a reasonable doubt about his mental state. *Drope*, 420 U.S. at 172-182. In sum, the system for determining whether a defendant is competent to stand trial is specifically designed to produce an accurate resolution of that issue even if the defendant is incapable of assisting in the process leading to that determination (or is actively resisting such a finding). For that reason, there is no reason to suppose that a defendant's mental illness will prevent the defense from proving that the accused is incompetent to stand trial.

3. *Balancing the competing interests does not indicate that the burden of proof must be on the party seeking to establish the defendant's competence*

It is reasonable to require the party seeking to establish that a defendant is incompetent to bear the burden of proof on that issue. This Court noted almost a century ago that the law presumes that a person is sane and that the presumption is "justified by the general experience of mankind" as well as by "considerations of public safety." *Davis* v. *United States*, 160 U.S. at 486. If it is permissible on those

grounds to assume that a defendant is sane, it is equally permissible, for the same reasons, to presume that a defendant is competent to be tried and therefore to place the burden on the party seeking to establish the contrary. Petitioner does not directly challenge those propositions, but instead attacks them indirectly by claiming that the Due Process Clause requires that the presumption of competence "fly away," "burst," or disappear once some proof of a defendant's mental illness is adduced.

Due process does not require a State to adopt a "bursting presumption" rule with respect to the burden of proof on the issue of competence. That is because the policy considerations that justify the initial presumption of competence "generally persist despite the existence of proof rebutting the presumed fact." *McCormick's Handbook of the Law of Evidence* § 345, at 822 (E. Cleary 2d ed. 1972). Experience teaches that most persons are mentally competent, that it is easier to prove incompetence than competence, and that the defense ordinarily has better access to information bearing on the competency inquiry than does the State.[14] For those reasons, it is rational for a legislature to conclude that all defendants should be presumed competent, and that the burden of proof

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[14] Petitioner disputes the second and third of those propositions, but his argument is unconvincing. In seeking to establish the defendant's incompetence, defense counsel will ordinarily have the cooperation of the defendant's family and associates, and often will have cooperation from and superior access to the defendant himself. Moreover, proving competence requires the State to prove, in essence, that the defendant is not deranged. Making such a showing presents not only the difficulties typically associated with proving a negative, but also the difficulties inherent in having to prove the mental state of another. Those difficulties are exacerbated if the defendant is resisting a finding of competence.

should rest with the party who claims that the defendant is among the few exceptions to the general rule. That is the rationale for imposing on the defendant the burden of proof to establish affirmative defenses, and this Court has repeatedly upheld applications of that principle against constitutional challenge.[15]

Petitioner makes no effort to prove that the presumption and assignment of the burden of proof in Cal. Penal Code § 1369(f) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. at 202. In fact, petitioner does not even discuss the decisions in *Patterson*, *Martin*, and *Walton*. Instead petitioner invokes this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which involved a constitutional claim of entitlement to a hearing prior to the termination of disability benefits. In that case, the Court noted three factors that bear on whether a pretermination hearing is required in a particular setting: (1) the private

[15] Petitioner seeks to distinguish this case from cases involving the burden of proof for affirmative defenses on the ground that affirmative defenses "may not be constitutionally required." Br. 14 n.4. Even if this Court's decisions on affirmative defenses can be distinguished on that ground, *Walton* v. *Arizona*, *supra*, clearly cannot. *Walton* upheld a statute requiring a defendant to prove by a preponderance of the evidence the existence of mitigating factors sufficiently substantial to call for leniency before the sentencing agency could consider such proof, despite the fact that a defendant in a capital case has a constitutional right to have the sentencer consider such proof. The Court determined that the statute did not violate the rule set forth in *Winship*, and it rejected the very distinction that petitioner seeks to draw here. Compare 110 S. Ct. at 3055 with *id.* at 3072 (Blackmun, J., dissenting).

interest that is affected by the official action; (2) the risk of an erroneous deprivation, and the extent to which additional procedural safeguards would reduce that risk; and (3) the burdens that additional procedures would place on the government. 424 U.S. at 335.

Although petitioner claims that the *Eldridge* balancing test "has consistently been used to analyze issues as to the allocation and degree of the burden of proof," Br. 10, none of the decisions he cites involved the allocation of the burden of proof, much less held unconstitutional a State's allocation of that burden.[16] With respect to the allocation of the burden of proof, the Court has not invoked the *Eldridge* balancing test, but has looked mainly to history and current practice to determine if the legislative decision at issue was consistent with due process. And on that question, as we have noted, the Court has consistently upheld statutes allocating to the defendant the burden of proof on issues other than the elements of the offense.

[16] The cases on which petitioner relies addressed the issue of the appropriate standard of proof, not the issue of the proper allocation of the burden of proof, *i.e.*, the risk of nonpersuasion. See *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981-2982 (1990) (whether a State may require a minor to prove by clear and convincing evidence that an abortion is in her best interests); *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2852-2855 (1990) (whether a State may require proof by clear and convincing evidence of the wishes of an incompetent patient about withdrawal of hydration and nutrition); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (whether a State may allow a parent to be declared unfit by a preponderance of the evidence); *Addington* v. *Texas*, 441 U.S. 418 (1979) (whether a State may allow a person to be civilly committed indefinitely upon proof by a preponderance of the evidence).

Even if *Eldridge* is applicable in this setting, the three-factor test from *Eldridge* does not suggest that it is constitutionally impermissible to allocate the burden of proof to the party seeking to prove that the defendant is incompetent.

a. With respect to the first *Eldridge* factor—the importance of the private interest at stake—petitioner emphasizes the "fundamental" nature of the defendant's interest in being tried only if he is competent. Br. 11-15. While it is true that the rule against trying an incompetent defendant is "fundamental to an adversary system of justice," Br. 11 (quoting *Drope*, 420 U.S. at 172), that does not end the inquiry. A State's interest in trying a competent defendant is no less "fundamental" than the interest of an incompetent defendant in not being tried. As Justice Brennan once explained, the "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Illinois* v. *Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring). See *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.") (quoting *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960)).

By analogy, the allocation of the burden of proof on the insanity defense is quite instructive on this point. There is a compelling interest in not convicting persons who are insane—an interest that could properly be deemed "fundamental"; every jurisdiction recognizes an insanity defense, and there is a universally shared belief that it is wrong to impose punishment on a person who is incapable of appreciating the nature and quality or the wrongfulness of his acts. On the other side of the balance, one

could argue that the consequences to the State of an acquittal by reason of insanity are not very grave: the verdict resolves the criminal charges, and the State has means of protecting itself against dangerous insanity-acquitted defendants through civil commitment, which can last even longer than the sentence that could have been imposed for the charged offense. *Jones* v. *United States*, 463 U.S. 354 (1983). Nonetheless, this Court has rejected the argument that due process requires the State to bear the burden of proof on the issue of insanity. *Leland* v. *Oregon*, *supra*; see also *Rivera* v. *Delaware*, 429 U.S. 877 (1976).[17]

This case follows *a fortiori* from the cases involving the burden of proof on the insanity defense. The consequence of imposing the burden of proof on the defendant to establish his insanity may be to convict and punish a person who is not responsible for his acts. By contrast, the consequence of imposing the burden of proof on the defendant to establish his incompetence is only to require him to stand trial; he may still be acquitted, by reason of insanity or otherwise, and if his incompetence becomes manifest at any time during the trial, the court must revisit the question and suspend the trial if necessary. Thus, the "fundamental" nature of the defendant's interest in not being tried while incompetent does not resolve the burden of proof issue.

b. The second *Eldridge* factor—the risk of an erroneous decision under the challenged procedures—

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[17] Similarly, it is "fundamental" that an insane prisoner may not be executed, *Ford* v. *Wainwright*, 478 U.S. 399 (1986), but the prisoner may be required to prove that he is insane. See *id.* at 410 ("Petitioner's allegations of insanity, if proved, * * * would bar his execution.").

also does not suggest that Section 1369(f) of the California Penal Code is unconstitutional. Petitioner claims that there is a significant risk that the trier of fact will erroneously find a mentally ill defendant competent due to the inherent uncertainty of psychiatric diagnoses. Br. 15-18. But the imprecision of competency determinations merely makes the chance of error greater overall; it does not make it more likely that error will be made in one direction rather than the other.

Obviously, allocating the burden to one party increases the risk of an "erroneous" decision against that party, just as it decreases the risk of an erroneous decision against the party that does not bear the burden.[18] But that is not to say that the overall risk of error is increased by placing the burden of proof on the party claiming incompetence. In referring to the increase in the risk of error, what petitioner really means is that in his view the consequences of error are more serious when a court finds a defendant competent than when it finds him incompetent. Thus, he suggests that erroneous findings of incompetence are relatively innocuous, while erroneous findings of competence have very severe consequences.

[18] Of course, with respect to the inexact science of assessing mental functioning, there is no baseline from which to determine with complete confidence when a particular ruling is "erroneous" and when it is correct. Nonetheless, placing the burden on one party rather than the other means that there is likely to be an increase in the number of rulings against the party with the burden. Inevitably, some of those rulings will be incorrect. It therefore stands to reason that the allocation of the burden of proof will ordinarily result in an increase in the number of "erroneous" rulings against the party with the burden of proof, regardless of how one determines what constitutes "error" in a competency ruling.

For that reason, the subtext of petitioner's argument is that the Constitution requires a State to allocate the burden of proof in a way that will make erroneous determinations of competence less likely and erroneous determinations of incompetence correspondingly more likely.[19] While petitioner prefers that outcome, it is not correct to pretend that that outcome represents an increase in the accuracy of the adjudicative process and a reduction of the risk of error. In sum, shifting the burden of proof is not like holding a pretermination hearing, the issue presented in *Eldridge*. Holding a pretermination hearing is likely to increase the accuracy of the termination decision; shifting the burden of proof to the State, by contrast, would do nothing to make the competency determination more reliable.

c. It is the third *Eldridge* factor—the costs and burdens of the proposed procedure—that provides the strongest argument against a constitutional rule imposing the burden of proof on the party seeking to

[19] Petitioner suggests that the burden of proof should be on the State in part because courts and juries are often skeptical of claims of incompetence and may suspect malingering even in the face of clear symptoms of severe mental illness. Despite petitioner's assertions on this score, however, there is no objective basis for concluding that finders of fact disregard compelling evidence of incompetence more often than they are fooled by a convincing, but contrived, effort by the defendant to appear to be incompetent. Indeed, in a case where the accused has no defense on the merits and faces a lengthy prison term, or in a case such as this one, where the defendant faces capital punishment, the incentive to feign incompetence may be considerable, and it is likely that the percentage of claims of incompetence that turn out to be the product of malingering will be correspondingly high.

establish a defendant's competence. We disagree with petitioner's suggestion that the consequences of an erroneous finding of incompetence are not particularly weighty. In fact, placing the burden of proof on the party claiming that the defendant is incompetent serves three important purposes:

First, it promotes the important state interest in the prompt resolution of criminal charges. That interest is not simply a matter of administrative convenience; delay in the trial often makes it more difficult for the State to prove its case and is likely to undermine the prospects for an accurate verdict. See *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986). In addition, the prompt resolution of criminal cases is vitally important to others affected by the criminal justice system, such as potential witnesses, victims, and family members of victims, for whom lengthy pretrial delays can be agonizing. See *Morris* v. *Slappy*, 461 U.S. 1, 14-15 (1983). Indeed, in some cases the allocation of the burden of proof to the State will mean that defendants who have not been shown to be incompetent will never be tried for their crimes, so that those cases will remain perpetually in limbo.[20]

Second, placing the burden of proof on the party claiming that the defendant is incompetent helps pre-

[20] In this regard, it is important to note that the California rule, like the federal rule, requires the party asserting incompetence to bear the burden of proof, regardless of whether that party is the defense or the prosecution. Although it is ordinarily the defendant who is asserting incompetence, that is not always the case. The defendant may have a substantial defense on the merits to the criminal charges and wish to proceed with the trial; imposing the burden of proof on a defendant seeking to prove his own competence could unjustifiably interfere with that interest.

vent the unwarranted confinement of a sane defendant in a mental institution. A defendant found incompetent to stand trial has a right not to be brought to trial in that condition, but he does not have a right to have the charges against him dismissed or to be released from custody. At common law, an insane defendant was committed to the "gaol" or an asylum until he recovered, see 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 20-22 (*20-*23) (1st Am. ed. Boston 1824); *Commonwealth* v. *Braley*, 1 Mass. at 103; *Freeman* v. *People*, 4 Denio 9, 25 (N.Y. Sup. Ct. 1847), and that rule still applies today. Congress and the States have determined that an incompetent defendant should be committed to a mental facility for observation and treatment. *Mentally Disabled* 703-705, Table 12.1, col. 21, at 744-753; *e.g.*, Cal. Penal Code § 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(d). This Court has approved short-term commitments for the period necessary to determine whether a defendant will regain his competence in the foreseeable future, and if so, for the period necessary for treatment designed to attain that end. *Jackson* v. *Indiana*, 406 U.S. at 738. Accordingly, the finding that a defendant is incompetent to stand trial will materially restrict his liberty interests in ways not suffered by other persons charged with a crime or held in jail pending trial. By placing the burden of proof on the party claiming that the defendant is incompetent, Cal. Penal Code § 1369(f) reduces the likelihood of erroneous commitments to mental institutions.

Finally, the allocation of the burden of proof selected by the California legislature helps to avoid the imposition of unnecessary and undesired medical treatment on a competent defendant. An incompetent defendant is committed to a mental hospital not

just for custody but also for treatment designed to restore his competence. Federal and state statutes authorize such treatment, *e.g.*, Cal. Penal Code § 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(d), and the courts have upheld that practice, see *e.g.*, *Mentally Disabled* Table 12.1, col. 18, at 744-754; *United States* v. *Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990); *United States* v. *Hayes*, 589 F.2d 811, 823 (5th Cir. 1979).[21] Involuntary medical treatment, however, is an additional intrusion on the liberty interests of an incompetent defendant that is not suffered by other defendants awaiting trial. For that reason, a finding that the defendant is incompetent will materially affect his liberty interest in bodily integrity and in refusing unwanted medical treatment. See *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2851 (1990); *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 24-30 (1905). Placing the burden of proof on the party claiming that the defendant is incompetent helps reduce the risk of erroneous medical treatment.

4. *The court's instruction on the presumption of competence was not improper*

Petitioner claims, Br. 26, 45-50, that the trial court erred by instructing the jury at the competency hearing that "[t]he defendant is presumed to be mentally competent." J.A. 87. It is not clear that that question is properly before the Court. The California Supreme Court did not address that question, see J.A. 93-101, and it is not fairly comprised within Question 1 in the certiorari petition, the only question this Court granted review to decide. Sup. Ct. R. 24.1(a); *e.g.*, *Tison* v. *Arizona*, 481 U.S. 137, 146 n.2 (1987); *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985). In any event, there is no merit to petitioner's claim, because there is no "reasonable likelihood" that the jury applied the challenged instruction in an unconstitutional manner. *Estelle* v. *McGuire*, No. 90-1704 (Dec. 4, 1991), slip op. 9; *Boyde* v. *California*, 494 U.S. 370, 380 (1990). The jury would have understood that instruction as requiring petitioner to prove that he was incompetent, which is precisely what the very next clause in the instruction made clear. See J.A. 87.

In the past, this Court has criticized the careless use of the word "presumption" in jury instructions on the ground that a jury could understand that term to shift the burden of proof or production to a defendant. *E.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). That criticism is beside the point in this case, however, because the State can place either burden on the defendant and has done so. The challenged instruction therefore simply and correctly states the law of California on this issue. If due process permits the State to impose the burden of proving incompetence on the defendant, it cannot be error for the court to explain to the jury the corollary proposition that a defendant is presumed to be competent and must be so found unless the contrary is shown to the jury's satisfaction.[22]

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[21] Most courts have further held that it is permissible to bring a defendant to trial if treatment has rendered him competent, even if he continues to take antipsychotic medication during the trial. That question is pending before the Court in *Riggins* v. *Nevada*, cert. granted, 112 S. Ct. 49 (1991).

[22] It is no more error for the court to instruct the jury on both the presumption of competence and the burden of proof than it would be error for a court to instruct a jury in a

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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criminal case both that the defendant is presumed to be innocent and that the government bears the burden of proof to establish his guilt.

APPENDIX A

1. Cal. Penal Code § 1369(f) (West 1982) provides as follows:

> In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

2. 18 U.S.C. 4241(d) provides as follows:

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

> (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
> (2) for an additional reasonable period of time until—
>
> > (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that

within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

3. 18 U.S.C. 4244(d) provides as follows:

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

APPENDIX B

For recent federal court decisions addressing the allocation of the burden of proof on the issue of competence, compare *Lowenfield* v. *Phelps*, 817 F.2d 285, 294 (5th Cir. 1987) (State may require the defendant to prove by a preponderance of the evidence that he is incompetent), aff'd on other grounds, 484 U.S. 231 (1988); and *United States* v. *Smith*, 521 F.2d 374, 377 (10th Cir. 1975) (the defendant bears the burden of proving that he is incompetent), with *Bilyew* v. *Franzen*, 686 F.2d 1238, 1244-1245 (7th Cir. 1982); *United States* v. *Hollis*, 569 F.2d 199, 203-207 (3d Cir. 1977); *United States* v. *DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Makris*, 535 F.2d 899, 906 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977); and *United States* v. *Maret*, 433 F.2d 1064, 1067 (8th Cir. 1970), cert. denied, 402 U.S. 989 (1971) (holding that the prosecution bears the burden of proving that the defendant is competent). See also *Brown* v. *Warden*, 682 F.2d 348, 351-354 (2d Cir.) (upholding the constitutionality of a state law requiring the State to prove by a preponderance of the evidence that a defendant is competent), cert. denied, 459 U.S. 991 (1982); *Bruce* v. *Estelle*, 536 F.2d 1051, 1058 (5th Cir. 1976) (burden of proving incompetence rests on defendant in federal habeas corpus proceeding), cert. denied, 429 U.S. 1053 (1977); *Conner* v. *Wingo*, 429 F.2d 630, 637 (6th Cir. 1970) (same).

For the recent state court decisions, compare *Deason* v. *State*, 263 Ark. 56, 58, 562 S.W.2d 79, 81, cert. denied, 439 U.S. 839 (1978); *Flowers* v. *State*, 353 So. 2d 1259 (Fla. Dist. Ct. App. 1978); *Wallace* v. *State*, 248 Ga. 255, 258-259, 282 S.E.2d 325, 330,

cert. denied, 453 U.S. 927 (1981); *State* v. *Aumann*, 265 N.W.2d 316, 319 (Iowa 1978); *State* v. *Rogers*, 419 So. 2d 840, 842 (La. 1982); *State* v. *Chapman*, 104 N.M. 324, 327, 721 P.2d 393, 395 (1986); *State* v. *Pruitt*, 18 Ohio App. 3d 50, 54-55, 480 N.E.2d 499, 505 (1984); and *State* v. *Jacobs*, 51 N.C. App. 324, 328, 276 S.E.2d 482, 485 (1981) (holding that the burden of proof rests on the party asserting the defendant's incompetence), with *Diaz* v. *State*, 508 A.2d 861, 864 (Del. 1986); *People* v. *McCullum*, 66 Ill. 2d 306, 312-314, 362 N.E.2d 307, 310-311 (1977); *Commonwealth* v. *Crowley*, 393 Mass. 393, 400-401, 471 N.E.2d 353, 357-358 (1984); *State* v. *Bertrand*, 123 N.H. 719, 727-728, 465 A.2d 912, 916 (1983); *State* v. *Otero*, 238 N.J. Super. 649, 652-653, 570 A.2d 503, 505 (Law Div. 1989); *People* v. *Wright*, 105 A.D.2d 1088, 482 N.Y.S.2d 591, 592 (1984); *State* v. *Heger*, 326 N.W.2d 855, 858 (N.D. 1982); *State* v. *Jones*, 406 N.W.2d 366, 370 (S.D. 1987); and *Manning* v. *State*, 730 S.W.2d 744 (Tex. Crim. App. 1987) (holding that State must prove by a preponderance of the evidence that the defendant is competent to stand trial). See *Jolley* v. *State*, 282 Md. 353, 364, 371, 384 A.2d 91, 98, 101 (1978) (state law requires the prosecution to prove beyond a reasonable doubt that a defendant is competent to stand trial); 2 P. Robinson, *Criminal Law Defenses* § 208(c), at 505 (1984) (collecting cases holding that the burden of proof rests on the party asserting incompetence).

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